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IN THE
Supreme Court of the United States

October Term, 1965
No. 551

JACK TRACY, Warden, Lancaster County Prison,
Petitioner

v.

RICHARD J. MANDUCHI

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Wilson Bucher, District Attorney of Lancaster County, on behalf of Commonwealth of Pennsylvania for Jack Tracy, Warden, prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Third Circuit entered in the above case on August 19, 1965.

OPINIONS BELOW

The opinion of the Court of Quarter Sessions of Lancaster County, Pennsylvania, is reported at 58 Lancaster Law Review 54. The second opinion of the Court of Quarter Sessions is reported at 58 Lancaster Law Review 481. The opinion of the Superior Court of Pennsylvania is reported at 198 Atlantic Reporter 2d Series, 613, 203 Pa. Superior Ct. 373. The opinion of the Court of Appeals for the Third Circuit is printed in the appendix.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was made and entered on the 19th day of August, 1965, and a copy thereof is appended to this petition in the Appendix at p. 10. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Notwithstanding the State Trial Court's finding, affirmed on appeal by the Superior and Supreme Courts of Pennsylvania, that the search and seizure pursuant to a concededly valid search warrant was reasonable, the United States District Court granted a writ of habeas corpus which was affirmed by the United States Third Circuit Court of Appeals. The questions presented are:

1. Whether a Federal Court is justified in nullifying the effect of a concededly valid search warrant by requiring the federal standard of notification of purpose and authority prior to breaking doors to seize bookmaking evidence, notwithstanding the trial court's finding that the nature of the offense required quick action on the part of the police?

2. Where defendant concedes that the constitutional command of the valid search warrant has been complied with, should the "variable" of a federal statute requiring notification of purpose and authority before executing a search warrant be imposed upon a State, particularly where there is evidence that compliance therewith would permit destruction of evidence?

STATUTES, FEDERAL RULES, AND REGULATIONS INVOLVED

AMENDMENT (IV.)

CONSTITUTION OF THE UNITED STATES

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

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18 U.S.C. 3109

The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.*

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* Section 3107 indicates that this section applies only to the Directors, Assistant Directors, Agents and Inspectors of the Federal Bureau of Investigation and Department of Justice.

STATEMENT

The undisputed facts of this case show that five (5) members of the Lancaster City Police Department, armed with a concededly valid search warrant, went to petitioner's apartment to search for bookmaking evidence. Petitioner's apartment consisted of two (2) adjoining rooms with entrance gained from a common hallway through a door reinforced with 1/8 inch thick sheet metal. There were two (2) telephones with unlisted numbers in this small apartment. About 12:00 o'clock noon on March 1, 1961, the officers proceeded to the apartment and Detective Williams, who led the party, tried the door and apparently finding it locked, knocked or tapped at the door and then, hearing a scuffling sound, hit the door with a sledge hammer and knocked it open. As the officers rushed into the room they saw petitioner together with two other individuals. Petitioner was then observed to turn away, put a piece of paper in his mouth and swallow it. The officers found in the apartment, between the mattress and the bed spring in the bedroom, several pads, described as run-down sheets, on which were written initials, names, amounts of money and plus and minus signs. Flash paper was also found. This was described as a type of thin tissue paper which can be destroyed by touching with a lighted cigarette. The officers also found racing information sheets, other various memoranda with initials and numerical figures and several daily race track papers. On top of the table beside the telephone the officers seized a slip of paper containing the names of race horses which

were scheduled to run at tracks outside Pennsylvania on March 1, 1961 (that same day). Cash in the amount of $22.00 was seized from the bed. Between 12:10 p.m. and 1:08 p.m. approximately eleven (11) telephone calls were made to petitioner's apartment in the presence of the police officers, many of the calling parties asking for "Red" which was petitioner's nickname. The callers placed bets on races which were scheduled to run on that day.

The raid of petitioner's apartment followed a period of surveillance by Detective Paul Rose of the Lancaster City Police Department after complaints had been received of a man using a telephone in a Lancaster store to call in bets. The man, one Melvin Steffy who was accidentally drowned prior to trial, was described by Detective Rose as a partially blind man who entered the store at Chestnut and Pine Streets, walked to a public telephone and was seen by the detective to dial petitioner's telephone number. Detective Rose then alerted the raiding party by walky-talky radio.

Petitioner was indicted for bookmaking. At the trial on September 12, 1961, after evidence was presented by the Commonwealth as to the manner in which the police officers gained entrance to petitioner's apartment, petitioner through his counsel moved to suppress the evidence under *Mapp vs. Ohio*, 367 U. S. 645, 81 S. Ct. 1084, on the theory that the search and seizure was unlawful.

It was then stipulated by counsel for the Commonwealth and petitioner that the testimony be transcribed and that a rule be granted to show cause why the motion to suppress should not be allowed, petitioner reserving his rights to raise the same question at a subsequent trial. The jury was then discharged.

Argument was had on the rule to show cause why the evidence should not be suppressed and on January 26, 1962, petitioner's motion to suppress the evidence was overruled in an opinion by the Honorable Joseph B. Wissler, President Judge, who held, inter alia, that under all the circumstances the search and seizure was not unreasonable.

The case again came on for trial on March 14, 1962, and the same evidence as to the search and seizure was admitted over petitioner's objection. On March 15, 1962, petitioner was found guilty by the jury. On July 12, 1963, the Honorable Joseph B. Wissler, President Judge, dismissed petitioner's motions for a new trial and in arrest of judgment, repeating his prior opinion that the search and seizure was reasonable.

On appeal to the Superior Court of Pennsylvania the action of the Lancaster County Court was unanimously upheld by an opinion on March 19, 1964, written by Judge Flood, 198 A. 2d 613, 203 Pa. Superior Ct. 373; allocatur to the Supreme Court of Pennsylvania was denied on May 11, 1964. On May 25, 1964, petitioner filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of Pennsylvania, and the petition was granted in an opinion by Judge Luongo dated September 4, 1964. An appeal to the United States Third Circuit Court of Appeals followed. On the 19th day of August, 1965, the Third Circuit Court of Appeals affirmed the decision of the United States District Court.

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed because it precludes States from developing workable rules governing searches and seizures, a right specifically recognized in *Ker v. California*, 374 U. S. 23.

Specifically the holding of the Third Circuit Court of Appeals, in effect, permits criminals to destroy evidence by requiring police officers to comply with an unreasonable and unrealistic notice requirement before breaking doors even though the officers are armed with a valid search warrant and even though they have reasonable grounds for believing that evidence will be destroyed if notice of authority and purpose is given.

In this case the "absolute" of probable cause is conceded. The quarrel is with the "variable" of whether notice of purpose and authority should have been given by the state officers before breaking the door to seize bookmaking evidence. *Ker* recognizes that an unannounced police intrusion into a private home does not always violate the Fourth Amendment. One exception noted by the dissenting opinion in *Ker* occurs "where those within made aware of the presence of someone outside (because for example there had been a knock at the door) are then engaged in activity which justifies the officers in the belief that an escape or the destruction of evidence is being attempted." A reading of the record will disclose that this is precisely what happened in this case.

The questions in this case are of great and recurring significance. We are in the midst of the most appalling

rise in crime in the history of this nation. While this is a bookmaking case which is only a misdemeanor under Pennsylvania law, the fact remains that gambling and organized crime are directly related. The power of organized crime is money, not guns. Its primary source is developed from illegal gambling activities. See: "Statement of the Honorable Robert F. Kennedy, Attorney General of the United States, before Subcommittee No. 5 of the House Committee on the Judiciary, in support of legislation to curb organized crime and racketeering, May 17, 1961."

States must be given the weapons to fight this evil and must not be fettered by unrealistic holdings that deny State Courts the right to determine in the first instance the reasonableness of complying with a "variable" as distinguished from a constitutional command. In short, the notice requirement of 18 U.S.C. 3109 is a "variable" and should not be given the status of a constitutional requirement.

CONCLUSION

For the reasons set forth above it is respectfully submitted that this petition for writ of certiorari should be granted.

WILSON BUCHER,
District Attorney,
Lancaster County,
Counsel for Petitioner.

APPENDIX

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 15088

United States of America ex rel. Richard J. Manduchi

v.

Jack Tracy, Warden, Lancaster County Prison,
Appellant

Appeal from the United States District Court for the Eastern District of Pennsylvania

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Submitted April 20, 1965

Before McLaughlin, Staley and Smith, Circuit Judges

OPINION OF THE COURT

(Filed August 19, 1965)

By McLaughlin, Circuit Judge.

Appellee had been convicted of the misdemeanor of bookmaking in the Commonwealth of Pennsylvania Court

of Quarter Sessions of Lancaster County. The conviction was affirmed on appeal and while serving the prison term of his sentence he instituted this habeas corpus proceeding in the district court. It was there conceded by respondent-appellant that on the Fourteenth Amendment Due Process Clause question here involved petitioner-appellee's state remedies had been effectively exhausted.

In the state trial, crucial evidence obtained as a result of searching appellee's apartment was admitted into evidence. Appellee's contention at the trial and in this proceeding has been and is that the search was unreasonable and therefore the mentioned evidence was inadmissible.

There is no dispute as to just what the facts themselves were. Around noon of March 1, 1961, Lancaster city detectives, having obtained a search warrant authorizing them to search appellee's apartment for bookmaking paraphernalia, went to that apartment. At the trial Detective Williams testified substantially that he, carrying a sledge hammer, approached the apartment main door. He tapped on the door twice, waited several seconds for the door to be opened, "turned the knob and the door was locked; * * *", heard "a little scuffling noise like someone moving around", and when he "couldn't get in * * * [he] stepped back and hit it twice with a sledge hammer and the door flew open." About the same time other officers broke through another door to the apartment by using a section of a telephone pole. Entering the apartment Detective Williams saw Manduchi put a piece of paper in his mouth and swallow it. Hidden in the apartment the officers found bet data sheets, easily destroyable thin paper and marked racing information material. In the course of the next hour while the police were still present there were approximately eleven

incoming telephone calls, a number of them asking for appellee and all of them placing bets on that day's races. The entrance door to the apartment had metal reinforcement not quite an eighth of an inch thick covering the entire inside of the door. The latter also had an extra heavy bolt latch on it under the ordinary lock. The numbers for the telephone and its extension had been removed from those instruments.

The district judge, holding that the search was unreasonable under the circumstances, allowed the writ and stayed its execution to give the Commonwealth the opportunity to appeal or to initiate proceedings for the retrial of petitioner.

Williams and his fellow officers when they arrived at the Manduchi apartment were proceeding properly under their search warrant. And Williams in knocking on the door, as he said he did, unquestionably acted lawfully. Immediately thereafter, he tried the door, found it apparently locked, heard a scuffling noise and forced the door open with his sledge hammer. Neither he nor any of the other officers announced their presence and purpose. The interval between Williams tapping on the door and breaking it open was a few seconds. All of this gives us the sole question on this appeal. Was the stated entrance reasonable under the then present circumstances as shown by the record? On appeal the Superior Court of Pennsylvania held that it was, saying:

> "We find no Pennsylvania appellate cases which discuss or determine the circumstances under which police officers armed with a warrant may break into a private dwelling place without first announcing their

purpose and giving the occupants a chance to admit them. Each case depends upon its own circumstances. (2) The circumstances surrounding the search and seizure in this case are not such as to make it unreasonable as a matter of law."

Commonwealth v. Manduchi, 203 Pa. Super. Ct. 373, 375 (1964), Pet. to Pa. Sp. Ct. for allowance of appeal den. No. 120-A, Misc. Docket No. 13, May 11, 1964.

In a comparable situation the leading and here controlling case, Ker v. California, 374 U.S. 23, 33-34 (1962) held:

> "We reiterate that the reasonableness of a search is in the first instance a substantive determination to be made by the trial court from the facts and circumstances of the case and in the light of the 'fundamental criteria' laid down by the Fourth Amendment and in opinions of this Court applying that Amendment. Findings of reasonableness, of course, are respected only insofar as consistent with federal constitutional guarantees. As we have stated above and in other cases involving federal constitutional rights, findings of state courts are by no means insulated against examination here."

The district court, having Ker very much in mind, properly concluded that the search warrant per se did not insulate the law enforcement representatives from the necessity of reasonably conducting their search. Under the Ker directive the court made its own examination of the facts and decided that the search when it was made was unreasonable.

In Ker there was also a "breaking" by the police in order to gain entrace to the Ker premises. That "break-

ing" was technical in as much as it was achieved by means of a key. Nevertheless the Court assumed (p. 38) "• • • that such breaking is permissible in executing an arrest under certain circumstances."

In the appeal before us there was no announcement from the police of who they were and why they sought entrance. Federal law requires notice of authority and purpose and refusal of admittance prior to breaking open such a door as that with which we are concerned. 18 U.S.C. §3109. Testing the validity of the present arrest is a matter of state law, Miller v. United States, 357 U.S. 301 (1958). The Pennsylvania state courts, as we have seen, have determined that in this instance the breaking without prior announcement of identity and purpose was not unreasonable as a matter of law and so affirmed the conviction. We therefore must examine the facts as they existed at the time of the entry and determine for ourselves whether the action of the police in breaking and entering without the required announcement and refusal of admission was reasonable under the circumstances.

In Ker, p. 35, as Mr. Justice Clark found in the Court opinion, "The information within the knowledge of the officers at the time they arrived at the Kers' apartment, as California's courts specifically found, clearly furnished grounds for a reasonable belief that petitioner George Ker had committed and was committing the offense of possession of marijuana." Commenting on the information the officers had as they entered the Ker residence the Court said p. 36: "To say that this coincidence of information was sufficient to support a reasonable belief of the officers that Ker was illegally in possession of marijuana is to

indulge in understatement." And the Court on p. 38 went on to hold:

> "Since the petitioners' federal constitution protection from unreasonable searches and seizures by police officers is here to be determined by whether the search was incident to a lawful arrest, we are warranted in examining that arrest to determine whether, notwithstanding its legality under state law, the method of entering the home may offend federal constitutional standards of reasonableness and therefore vitiate the legality of an accompanying search. We find no such offensive on the facts here."

The Court examined the disclosed facts of the Ker entry and decided:

> "Here justification for the officers' failure to give notice is uniquely present. In addition to the officers' belief that Ker was in possession of narcotics, which could be quickly and easily destroyed, Ker's furtive conduct in eluding them shortly before the arrest was ground for the belief that he might well have been expecting the police. We therefore hold that in the particular circumstances of this case the officers' method of entry, sanctioned by the law of California, was not unreasonable under the standards of the Fourth Amendment as applied to the States through the Fourteenth Amendment."

In the search of the Manduchi apartment we are confined to what the trial record shows the police knew regarding Manduchi at that time. What they found as a result of the search is inadmissible as evidence if the circumstances revealed in the record to be within the knowledge of the

police as they broke in the door did not render that breaking permissible.

The police did have a warrant which authorized them to search for bookmaking equipment. None of the information on which this was based was offered at the trial except perhaps in the testimony of Detective Rose. He said that the morning of the raid he was in a particular variety store. As to this there were the following questions and answers:

"The Court: You went into the store. All right, then what happened?

Witness: I'd like to explain. I was in the store on a number of occasions prior to March the first. We received a complaint on February 15th that a suspect was entering a store and making bets—

Mr. Brown: (interposing) Now, Your Honor—

The Court: That isn't it. What I asked you—you went into the store. Now, what happened there?

Mr. Brown: Now, we have to object to this, Your Honor.

The Court: That phase—of course the objection is sustained. I'm just asking: You were in the store, that is what I want to know?

Witness: That is correct. I went into the store.

The Court: Then what happened while you were in the store?

Witness: While I was in the store Mr. Steffy came into the store and he walked over to the telephone and he dialed a number which was Express—

• • • • • • • •

Q. Now, you say that this man Steffy made a telephone call?

A. Yes, Mr. Steffy was partially blind and at times he wore glasses and at times he wore dark glasses, and when he entered the store he walked to the telephone to make a call. When I saw him walking in the store I—his back was towards me so I walked up in back of him and when I saw him dial '2-38042' I immediately went to the rear room of the store and radioed by walkie talkie to the station. As soon as I heard him saying 'Red'—'Steffy'. And after I radioed the station I came back to the phone and stood in back of Mr. Steffy for approximately two to three minutes. I didn't get too close to him at the time. He stopped talking for an instant and then I walked up to him, and he looked into the telephone and hung it up on the receiver very quietly and started to walk out. • • •"

Rose was cross-examined regarding the complaint he had mentioned:

"Q. Well, was the complaint directing you to go to the store?

A. The complainant stated that there was a man came in every day—gave a description of him—as making calls. And they thought it was horse race bets."

Appellant asserts that prior to knocking on Manduchi's door the Lancaster police had information that (1) Manduchi was a bookmaker and receiving bets on the day of the raid; (2) that bookmakers make memoranda of bets many times on flash paper which is easily destroyed; (3) that Manduchi had a telephone or telephones in his apartment over which he received bets; (4) that telephone wires can be quickly torn out or cut thus destroying evidence of

incoming calls; (5) that the police had knocked at the door before entering; (6) that the police had heard a scuffling sound inside.

We have seen the evidence which was actually before the court and jury as to Manduchi being a bookmaker and receiving bets on the raid day. We are not unduly disturbed regarding the hearsay source of this for as stated in Ker, p. 36, "That this information was hearsay does not destroy its role in establishing probable cause." Entirely aside from that it was very little indeed. There was no evidence offered in support of (2) as of the time of the raid. We have already noted that there was some evidence that Manduchi had a telephone at the time of the entry. There is nothing in the pre-raid record to substantiate the proposition of telephone wires being put out of commission quickly to eliminate incoming calls. There is testimony that Williams did knock at the door and did hear a scuffling sound prior to entering.

The issue confronting us for decision is truly rather close. But just as truly the evidence that was introduced at the Manduchi trial was not of the urgency that called for the immediate action of forcing entry without making known who was at the door and their purpose and of allowing the occupants the opportunity of opening the door peaceably. There may possibly be available background evidence that perhaps might indicate exigent circumstances which are in accord with the Ker standard. At the new trial provided for by the district court order, if desired by the Commonwealth, opportunity would be afforded for the proffer of that testimony if any.

The judgment of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

END